Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 356

J. D. LEWIS and ZELMA LEWIS,
Petitioners,

VERSUS

SPENCER CARVER, Trustee,
Respondent.

PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

JOHN B. OCHER,
1403-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

November, 1955.

INTERSTATE TYPESETTING CO., 19 SO. WALKER, OKLAHOMA CITY, PH. PO 9-5780

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PETITION FOR REHEARING

Come now the above named petitioners and show to this Honorable Court that on the 7th day of November, 1955, this Court denied the petitioners' petition for Writ of Certiorari in this case and declined to assume original jurisdiction.

These petitioners now show to this Honorable Court that they believe a rehearing should be granted and the Writ should be issued, and the cause be reviewed and determined by this Court for the following reasons, namely:

(1) One of the questions presented is whether or not a United States Trial Judge can deny a litigant a

right to a trial by jury in violation of his Constitutional rights as guaranteed under Amendment Seven of the Constitution of the United States and Rule 38, Rules of Civil Procedure.

(2) Whether or not a United States Court can take away from a State Court jurisdiction to try the same case between the same parties, involving the same *res*, when the State Court had first acquired jurisdiction.

(3) Whether or not a litigant after filing a motion to vacate a judgment on the sole ground that the judgment is void can appeal from a denial of said motion to the Court of Appeals under Rule 60, Rules of Civil Procedure, Paragraph (b).

The Court of Appeals held that the petitioners here could not appeal from an order of the United States District Court denying their motion to vacate the judgment on the ground that the judgment was void, and the petitioners most respectfully urge this Court to determine said question and construe said Rule.

These petitioners now respectfully show to this Honorable Court that to deny them the right to appeal under said Rule would be to deny them due process of law, and that they were entitled, as a matter of right, to have the United States Court of Appeals, Fifth Circuit, determine their appeal.

These petitioners now most respectfully show to this Honorable Court that they believe this Court should determine whether or not a United States District Judge has the right to deny a litigant a jury trial in a civil action in

violation of Amendment Seven to the Constitution of the United States and Rule 38, Rules of Civil Procedure, and these petitioners now show to this Honorable Court that their rights as citizens have been denied to them by virtue of the fact that they were denied a jury trial after due demand in a cause wherein under the Constitution of the United States and the Rules of Civil Procedure heretofore mentioned provided for a jury trial.

This appeal also presents the question of a United States District Court taking jurisdiction over a case then pending in a State District Court involving the same *res* and the same parties which these petitioners believe should be decided in this Court in this case.

These petitioners further show to this Honorable Court that all of the questions herein presented are important legal questions and that so far as your petitioners know, the question raised with reference to the denial of a jury trial has not been passed upon by this Court and neither has the question of whether or not the petitioners had the right to appeal from an order denying their motion to vacate a void judgment been decided by this Court.

These petitioners therefore most respectfully request this Court to grant a rehearing in this cause and reconsider the questions thus presented, and to issue the Writ as prayed for.

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION

This brief will be very concise and few authorities cited for the reason that a brief was filed in support of the petition in this cause and it would serve no useful purpose to reiterate and restate the authorities therein set out. Factually, however, the writer of this brief believes that this Court must not have received a proper or full import of the meaning of this case to the administration of justice under the Federal Rules of Civil Procedure and the Constitution of the United States and will, therefore, briefly restate the facts in this case. The figures hereinbelow given will not be correct for the reason that it would require the computation of interest from various dates and the figures will only be approximate but substantially correct.

The J. R. Watkins Company, a foreign corporation in the State of Texas, filed suit against J. D. Lewis in the State District Court in Dallas, Texas. The plaintiff there was represented by Spencer Carver, an attorney. The suit was on a note in the proximate sum of $30,000.00. The defendant Lewis filed his answer, a pre-trial was had, the case was ready for trial. In his answer the defendant Lewis pleaded that the plaintiff company was indebted to him and set out in detail the items of indebtedness which would more than offset the note sued on. The plaintiff alleged that a mortgage was given to secure the note. The issues were thus formed in the State Court. After that time, Spencer Carver, who was the attorney as heretofore stated for the Watkins Company, filed a so-called suit (this case) in the United States District Court, Northern District of Texas, wherein he claimed that he had bought some other

claim or lien against Lewis and he styled himself "Spencer Carver, Trustee" and sued Lewis, defendant in the State Court, and his own client, the J. R. Watkins Company, a corporation, plaintiff in the State Court, and had the summons served upon himself or his law firm for the J. R. Watkins Company, and then represented the J. R. Watkins Company which was named as a defendant sued by him, and thus attempted to confer jurisdiction upon the United States District Court while the same case, involving the same note, the same offsets, the same credits, and the same *res* was pending in the State District Court. He filed answer for the J. R. Watkins Company, plaintiff in the State Court, defendant in the Federal Court. In other words, he sued the J. R. Watkins Company in the Federal Court, served himself as their attorney, filed answer for the J. R. Watkins Company as attorney for the J. R. Watkins Company. When this suit was filed, the defendant Lewis immediately filed a motion to dismiss it for the reason that the Federal Court had no jurisdiction as the case was then pending in the State Court between the same parties, that is, the J. R. Watkins Company and J. D. Lewis. The United States District Court overruled his motion, he filed his written demand in due time in accordance with the Rules of Civil Procedure demanding a jury trial which was by the trial court denied. He then filed answer and again questioned the jurisdiction of the United States District Court at Dallas and pleaded his defense which was denied and judgment rendered in favor of the J. R. Watkins Company against Lewis involving the same alleged obligation, the same *res* and the same defense presented in the State

Court while that case was still pending in the State Court. After judgment was rendered, motion for new trial was filed and overruled, and thereafter, J. D. Lewis filed a motion to vacate the judgment under Rule 60(b), Rules of Civil Procedure, and also filed separate motions asking the Court to vacate the sale for the reason that the United States Marshal had sold his property of the value of $30,000.00 for $2,000.00 which was inadequate and alleged reasons for vacating the sale as well as his motion to vacate the judgment on the ground that the judgment was void. He also filed a motion asking the Court to permit him to remove air-conditioning units from the building in Dallas, which motion was denied.

From the order and judgment of the Court denying his motion to vacate the judgment because the judgment was void, and the order denying his motion to vacate the sale on account of inadequacy of sale price, and from the order denying him the right to remove the air-conditioners, he duly perfected his appeal to the United States Court of Appeals, Fifth Circuit. The United States Court of Appeals, Fifth Circuit, said that this was not an appealable order. In this we think the Fifth Circuit made error and denied to the petitioner here due process of law and the ultimate questions to be decided by this Court, if this Court assumes jurisdiction, are:

(1) Did the United States District Court in Dallas, Texas, have jurisdiction to adjudicate or try this case when the same case was pending in the State District Court.

(2) Did the United States Court deny the petitioner due process of law in refusing him a jury trial as guaranteed to him by the Constitution of the United States and the Rules of Civil Procedure.

(3) Did the petitioner in this case have a right to appeal from the action of the United States District Court in refusing to vacate the judgment on the ground that it was a void judgment having been reached without due process of law.

This statement, we think, fairly presents to this Court the questions herein presented, and the petitioner will now submit briefly his argument in support of why this Court should assume jurisdiction and determine the questions herein involved.

ARGUMENT

The argument will likewise be brief, but nevertheless, we think important for the reason that unless this Court clarifies the Rules which have been made by the lower courts in this case, this petitioner will suffer irreparable injury and damage, and in addition thereto, this Court has never passed upon, so far as we are able to determine, at least some of the questions herein involved, and we think the Court should, for the benefit of the public and as a matter of public policy, in addition to the rights of this petitioner, determine these matters.

The authorities are abundant and cited in the brief heretofore mentioned to the fact that when a State Court

acquires jurisdiction of the *res*, the United States Court is thereby precluded from assuming jurisdiction over the same *res* between the same parties, to the same extent as the State Court is precluded from assuming jurisdiction over the same parties and over the same *res* while the same is pending before a Federal Court. In other words, the rule and the law works both ways, otherwise there would be a continual overlapping of jurisdiction and authorities between State and Federal Courts because if the State Court can take away from the Federal Court a case that is pending before it between the same parties involving the same *res*, or a Federal Court can take away from the State a case pending between the same parties involving the same *res*, there would be no stability in courts and no rule or guide. While we are aware of the fact that in ordinary litigation where there is only a suit *in personam* between two parties, the Court first determining the matter has the right to render judgment, but this is not true according to the opinions of this Court in the cases presented and cited in the brief where the suit is between the same parties and involving the same *res*.

Factually, it is difficult to know what the Constitution of the United States means and the Rules of Civil Procedure, if after a written demand for a jury trial in a proper case the trial judge can brush aside the demand and give it no consideration and deny a litigant a jury trial when he is clearly entitled to it as a citizen of the United States under the Constitution and Rules of Civil Procedure both of which are cited in the original brief. That matter as to the fact of the denial of a jury trial in a civil case has never

been decided by this Court so far as we are able to determine, but the United States Court of Appeals, Fifth Circuit, held substantially on the point that this constituted a denial of due process of law and made the judgment absolutely void. That case is cited in the original brief herein and so far as we are able to find, it is the only time the question has been squarely presented and passed upon by the Appellate United States Court in a civil case.

Next, we feel beyond a question of a doubt that when the Marshal sells property for a wholly inadequate consideration and one that would shock the conscience of the Court that it was the duty of the trial judge to vacate the sale. Whether this be true or not, or whether the trial judge made error or did not make error, we feel that the petitioner in this case certainly had the right to appeal from the order denying the same and have the United States Court of Appeals, Fifth Circuit, determine that question.

Lastly, may we say to the Court that surely a citizen of this Republic has the right to have these matters passed upon by the United States Court of Appeals when his rights have been thus invaded and violated. We think the least this Court should do would be to direct the United States Court of Appeals to pass upon the questions rather than to write an order or opinion and say that the petitioner were had no right to appeal. The Circuit Court simply said in substance that the orders appealed from were not appealable orders. Consequently, of course, it did not have jurisdiction to decide the questions herein involved, and unless this Court grants certiorari, it leaves this citizen

without any relief of any kind, although his rights, we presume, would be by all persons admittedly taken from him, and the rights granted to him by the Constitution of the United States and the laws of both the State of Texas and the United States of America.

Title 28 U.S.C.A. Article 2283 is as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It will be observed from the notes wherein this Section was construed by this Court that the Federal Court in Dallas in the case at bar was wholly without jurisdiction. Therefore, its judgment was void under the admitted facts in this case. The United States Court of Appeals, Fifth Circuit, in the case of *Albuquerque Nat'l Bank* v. *Citizens Nat'l Bank in Abilene et al.*, 212 F.2d 943, said in the body of the opinion as follows:

> "We think that the action pending in the United States District Court for the Northern District of Texas is an action *in rem* and has been such since it was first instituted in the Texas state court, and that adequate provisions for service of process in such an action upon non-residents of the State of Texas appear in the Texas Statutes and Rules, Articles 1975, 1976, Vernon's Ann. Civil Statutes of Texas, and Rule 108 of Texas Rules of Practice and Procedure, and also in 28 U.S.C.A. Sec. 1655. The action in the United States District Court for the District of New Mexico is professedly strictly a suit *in rem*. The rule as to actions *in rem* has been

stated in *Palmer* v. *State of Texas*, 212 U.S. 118, 125, 29 S.Ct. 230, 232, 53 L.Ed. 435, as follows:

> 'If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty.'

See also, *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 229, 43 Sup. Ct. 79, 82, 67 L. Ed. 226."

See also: *Amalgamated Clothing Workers of America* v. *The Richman Brothers*, 348 U.S. 511, 99 L. Ed. (Advance p. 422), 75 Sup. Ct. 452, 23 U.S. Law Week 4165 (No. 173, decided April 4, 1955). Judgment of the United States Court of Appeals for the Sixth Circuit affirmed.

CONCLUSION

In concluding, may we respectfully urge that this is an important case and one of first impression in some respects in this Court and of great importance to the petitioners and to the people, and this Court should decide whether the Federal Courts can invade, override and overrule the State Courts while the cases are still pending in the State Courts and without authority take away from a citizen his rights to a trial by jury and to an appeal by the United States Court of Appeals.

We therefore most respectfully urge this Honorable Court to reconsider the petition filed herein and to grant to this petitioner the Writ as prayed for.

Respectfully submitted,

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

November, 1955.

CERTIFICATE OF COUNSEL

I hereby certify that the Petition for Rehearing filed herein is filed and presented in good faith and not for delay and in order that substantial justice may be done.

JOHN B. OGDEN.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above and foregoing Petition for Rehearing and Brief in Support Thereof upon the respondent, Spencer Carver, Trustee, by depositing the same in the United States Mail with postage prepaid, and properly addressed to Spencer Carver, Trustee, 2020 Republic National Bank Building, Dallas, Texas, on this 14th day of November, 1955.

JOHN B. OGDEN.